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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT SEATTLE

9                   JEREMY CONKLIN,

10                  Plaintiff,

11                  v.

12                  UNIVERSITY OF WASHINGTON  
13                  MEDICINE, *et al.*,

14                  Defendants.

15                  CASE NO. C18-0090RSL

16                  ORDER GRANTING ABTS AND  
17                  TSDA'S MOTIONS TO DISMISS

18         This matter comes before the Court on “Defendant Thoracic Surgery Directors  
19         Association’s Motion to Dismiss Plaintiff’s Second Amended Complaint” (Dkt. # 120)  
20         and “Defendant American Board of Thoracic Surgery, Inc.’s Motions to Dismiss Second  
21         Amended Complaint” (Dkt. # 121).

22         Plaintiff, a Doctor of Osteopathic Medicine (“DO”), applied for a congenital  
23         cardiac surgery (“CCS”) fellowship sponsored by the University of Washington School  
24         of Medicine in 2015, 2016, and 2017. His application was rejected each time. After the  
25         2017 rejection, the program director informed plaintiff that his application had been  
26         rejected because he did not meet one of the eligibility requirements, namely  
27         “[c]ertification or eligibility for certification by the American Board of Thoracic  
28         Surgery.” Dkt. # 4-1 at 21.

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1       Defendant Thoracic Surgery Directors Association (“TSDA”) operates a match  
2 program through which applicants apply for training residencies and fellowships,  
3 including the CCS fellowship to which plaintiff applied. In order to participate in the  
4 CCS match program, TSDA requires that applicants be board certified or eligible to be  
5 board certified by defendant the American Board of Thoracic Surgery (“ABTS”).  
6 Plaintiff was not eligible for certification by the ABTS because he did not complete a  
7 course of training accredited by the Accreditation Council for Graduate Medical  
8 Education (“ACGME”). Plaintiff alleges that the eligibility requirements ABTS set for  
9 board certification and TSDA set for the CCS match impermissibly excluded DOs in  
10 violation of federal and state antitrust laws.<sup>1</sup> Plaintiff further alleges that TSDA and  
11 ABTS conspired with other defendants to preclude DOs from practicing in certain  
12 specialties, such as CCS, in favor of MDs, thereby causing him emotional distress.  
13 TSDA and ABTS seek dismissal of all claims asserted against it.

14       The question for the Court on a motion to dismiss is whether the facts alleged in  
15 the complaint sufficiently state a “plausible” ground for relief. Bell Atl. Corp. v.  
16 Twombly, 550 U.S. 544, 570 (2007).

17       A claim is facially plausible when the plaintiff pleads factual content that  
18 allows the court to draw the reasonable inference that the defendant is  
19 liable for the misconduct alleged. Plausibility requires pleading facts, as  
20 opposed to conclusory allegations or the formulaic recitation of elements  
21 of a cause of action, and must rise above the mere conceivability or  
22 possibility of unlawful conduct that entitles the pleader to relief. Factual  
23 allegations must be enough to raise a right to relief above the speculative  
24 level. Where a complaint pleads facts that are merely consistent with a  
25 defendant’s liability, it stops short of the line between possibility and  
26 plausibility of entitlement to relief. Nor is it enough that the complaint is  
factually neutral; rather, it must be factually suggestive.

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25       <sup>1</sup> Plaintiff’s 2017 application for the University of Washington CCS fellowship was  
26 rejected before the match for failure to meet these eligibility requirements.

1       Somers v. Apple, Inc., 729 F.3d 953, 959-60 (9th Cir. 2013) (internal quotation marks  
2 and citations omitted). All well-pleaded allegations are presumed to be true, with all  
3 reasonable inferences drawn in favor of the non-moving party. In re Fitness Holdings  
4 Int'l, Inc., 714 F.3d 1141, 1144-45 (9th Cir. 2013). If the complaint fails to state a  
5 cognizable legal theory or fails to provide sufficient facts to support a claim, dismissal is  
6 appropriate. Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th  
7 Cir. 2010).

8           Having considered the allegations of the Second Amended Complaint, the  
9 submissions of the parties, and the remainder of the record, the Court finds as follows:

10 **A. Antitrust Claims**

11           In order to state an antitrust claim under federal law, plaintiff must plead  
12 sufficient facts to state a plausible antitrust injury. “Antitrust injury” means “injury of  
13 the type the antitrust laws were intended to prevent and that flows from that which  
14 makes defendants’ acts unlawful.” Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429  
15 U.S. 477, 489 (1977). For the reasons set forth in the Order Granting in Part Provider  
16 Defendants’ Motion to Dismiss, plaintiff’s federal and state antitrust claims fail as a  
17 matter of law.

18 **B. Civil Conspiracy**

19           Plaintiff alleges that defendants conspired to violate federal and state antitrust  
20 laws and to discriminate against him in violation of RCW 70.41.235. He does not  
21 dispute that if, as found above and in the Order Granting in Part Provider Defendants’  
22 Motion to Dismiss, he has failed to allege a viable antitrust or statutory claim, his  
23 conspiracy claim based on the same conduct fails as a matter of law.

24 **C. Negligent Infliction of Emotional Distress**

25           “As with any claim sounding in negligence, where a plaintiff brings suit based on

1 negligent infliction of emotional distress we test the plaintiff's negligence claim against  
2 the established concepts of duty, breach, proximate cause, and damage or injury.”  
3 Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn. 2d 233, 243 (2001) (internal quotation  
4 marks and citation omitted). Plaintiff has failed to adequately allege a breach of any  
5 duty TSDA or ABTS owed plaintiff to refrain from violating federal or state antitrust  
6 laws.

7 **D. Declaratory Judgment**

8 Plaintiff's declaratory judgment claim is based on antitrust violations that he has  
9 not adequately alleged.

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11 For all of the foregoing reasons, ABTS and TSDA's motions to dismiss (Dkt.  
12 # 120 and # 121) are GRANTED.

13 Dated this 4th day of December, 2018.

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15 Robert S. Lasnik  
16 United States District Judge  
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